93-139

NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

R.S. and J.M.S.,

Petitioners

versus

Children and Youth

Services of PA.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
PENNSYLVANIA
PITTSBURGH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

Michael Hahalyak
COUNSEL OF RECORD
FOR PETITIONERS
2210 Clark Building
Pgh., Pa. 15222
(412) 261-2001

93-139

QUESTION PRESENTED

Where a state agency (Children & Youth Services, CYS), charged under the statute with reuniting a custodial child with his family, imposes over a continuous period of 8 years arbitrary visitation regulations on the parents which effectually prohibits reunification, such as limiting the actual visiting hours of the parents to a total of 26 hours a year, repeatedly refusing the parents' request to visit the child beyond the allotted one hour period every two weeks, confining the visit to a room 4' x 8', subjecting the room to video surveillance and the constant presence of

a caseworker, refusing to permit the child to be taken to the family home to visit with his brothers and sisters, refusing to permit the parents to baptize their child or to discuss with the child issues pertaining to his school work, his health, his well being, etc., under penalty of termination of parental rights, which penalty was enforced, and simultaneously during this eight year period the parents, who are of good repute and without any criminal record, religiously visit their child and rear four minor children at home in a highly successful manner, one of the children being an "A" student, was the

statute and order authorizing termination of parental rights as interpreted and applied by the Court in this case, in violation of their parental rights under the Constitution (14th) and in this regard is a finding of "unfitness of the parents" a constitutional prerequisite before the Court could lawfully terminate parental rights?

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LIVES, CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS DURING CUSTODIAL PERIODS IS SORELY NEEDED TO BE DEFINED IN PARENTAL TERMINATION CASES. THE REASON IS APPARENT. THE AGENCIES' PRIMARY DUTY IS TO REUNIFY THE FAMILY AND HEAL THE WOUNDS. IT HAS INSTEAD BECOME A "SUPER PARENT" LAYING DOWN BUREAUCRATIC RULES, THE BREACH OF WHICH ALONE IS SUFFICIENT (SOLE CRITERION) TO TERMINATE PETITIONERS' PARENTAL RIGHTS, AS OCCURRED IN THIS CASE, DESPITE THE FACT THAT THE PARENTS WERE SIMULTANEOUSLY RAISING THEIR FOUR MINOR CHILDREN AT HOME IN AN EXEMPLARY MANNER AND DESPITE THE FACT THAT

THIS COURT STATED THAT TERMINATION WOULD APPEAR UNCONSTITUTIONAL WHERE THE PARENT IS FIT AND WHERE THE SOLE REASON GIVEN IS THE "BEST INTEREST" OF THE CHILD. THE COURT BELOW FOUND THE "BEST INTEREST" OF THE CHILD WAS TERMINATION BECAUSE OF LACK OF FAMILY TIES - A SITUATION CREATED BY CYS ITSELF WHICH BY ITS OWN ARBITRARY RULES LIMITED PETITIONERS TO A TOTAL OF 26 HOURS OF VISITATION PER YEAR. THIS COURT SHOULD DECIDE WHETHER IN ANY PARENTAL TERMINATION CASE THE SOCIAL AGENCY MUST BEAR THE BURDEN OF PROVING AS A CONSTITUTIONAL PREREQUISITE TO A TERMINATION ORDER: (1) THAT THE SOCIAL AGENCY

OFFERED REASONABLE AVENUES OF RE-UNIFICATION, PARTICULARLY REASONABLE VISITATION RIGHTS, AS TO TIME, PLACE, ETC., AND (2) THAT PARENTAL RIGHTS CANNOT BE CONSTITUTIONALLY TERMINATED WHERE THE PARENT IS SHOWN TO BE A FIT PARENT REGARDLESS OF ALLEGED BREACHES OF BUREAUCRATIC RULES.

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OCTOBER TERM, 1992

R.S. and J.M.S.,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PITTSBURGH DISTRICT

R.S., with joinder of J.M.S., petition this Court for a writ of certiorari to the Superior Court of Pennsylvania, Pittsburgh District.[1]

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[1] Since the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal, the writ of certiorari is

OPINIONS BELOW

The memorandum opinion of the Court of Common Pleas of Allegheny County, filed at Docket No. 260 of 1986, is unpublished. It is reproduced in Appendix A.

The opinion of the Superior Court affirming the order of the lower court at Superior Court Docket No.1317 Pgh., 1991, is published at 417 Pa. Super 247, 612 A.2d 465 (1992) and is reproduced in Appendix B.

The Pa. Supreme Court entered an Order dated March 17, 1993 denying an allowance of appeal. No opinion was filed. It is reproduced in Appendix C.

JURISDICTION

The Order of the Court of Common

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directed to the Superior Court of Pennsylvania which was the last appellate court to consider this case on its merits.

Pleas terminating parental rights was entered on June 29, 1991 and was timely appealed to the Superior Court of Pa., Pgh. District. The Superior Court filed its decision on July 7, 1992. A Petition for an Allowance of Appeal was timely filed with the Supreme Court of Pa. and an Order denying the appeal was entered March 17, 1993. This petition for certiorari has been filed within 90 days of the date of the Supreme Court Order. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment:

Sec. I of the 14th Amendment states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ADOPTION ACT OF 1990

23 Pa.C.S.A. Sec. 2511 (a)(5); (b)

1980, Oct. 15 P.L. 934, No. 163 Sec. 1, eff. Jan 1, 1981.

Sec. 2511. Grounds for Involuntary Termination

"(a)**General rule.**-The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds.. (5)The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least

six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

(b) **Other considerations.**-The court in termin- ating the rights of a parent shall give primary consideration to the needs and welfare of the child....

CONSTITUTIONAL ISSUE

This issue was raised (but not discussed by the court below) in paragraphs 4, 11 and 14 of petitioner's Motion for Post-Trial Relief (Exceptions)

and in the single Question Presented for Review in the Superior and the Supreme Court. The essential reason given by CYS and the Court in terminating parental rights was the lack of close parental ties. But this failure was the direct result of CYS' denial of the parents' constitutional rights of visitation which CYS limited to a mere 26 hours per year.

STATEMENT OF THE CASE

This case involves the constitutionality of the statute authorizing authorizing the involuntary termination of parental rights as interpreted and applied by CYS and the Court below. The petition for termination was filed by CYS. After hearing an order was entered by the Court of Common Pleas of Allegheny County, Orphans' Court Division, terminaating the rights of the parents to their son Steven. An appeal was taken to the Superior Court of Pa. (three judge panel) which affirmed with a dissenting opinion by Cirillo, J. who would have reversed because of a manifest abuse of discretion by CYS and by the lower Court. The petition for allowance of appeal to the Supreme Court of Pa. was denied.

When Steven was two months old he suffered a broken leg when he fell from

the tailgate of the station wagon while the father was changing his diaper. The parents themselves took their son to the hospital the following day when they noticed the swelling of the leg. The resident physician reported the matter to CYS as possible child abuse. After a hearing in Juvenile Court, custody remained in the father. A few months later, CYS brought charges of neglect (malnutrition) because the child was losing weight and at this hearing in 1983 the Court declared the child dependent and placed him in the custody of CYS which continues to the present time. At the termination hearing in 1991, however, the records of the visiting nurse in 1983 were discovered and it was learned that the nurse had made a written report, which apparently was never disclosed in the 1983 hearing, in which the nurse

noted that the baby was very thin but alert, that she recommended that feeding "amounts be small", that the "baby is receiving good care, that the mother was feeding the baby appropriately" and that the cast was to be removed because "the baby was losing weight".

The father denied any intentional injury. Psychological tests confirmed that he did not have a propensity to abuse children. The father's non-violent non-criminal background and CYS' investigation caused all parties to stipulate that the father was not a danger to his children.

The father married twice. He had two children by his first marriage. His first wife was an alcoholic and drug addict. The oldest child, Robert, was conceived during the mother's drug and alcoholic addiction period and is in CYS custody.

The Court awarded both children to the father who remarried and has five children with his second wife, including Steven, who range in ages from 1 to 15 years.

During the 8 years that CYS retained custody of Steven the parents raised their four children in a most exemplary manner. Their eldest daughter, Audrey, was an A student at the Clayton School and is enrolled in the gifted child program. All of the children are doing well in school. The father was active in church work and in the PTA. Both parents taught Sunday School.

The parents visited Steven regularly during the past 8 years but were severely restricted by CYS in their contacts. When the parents asked for extended visiting hours, CYS allowed them 26 hours a year - an hour every two weeks. When the child

was unable to come, CYS refused makeup time; when the parents visited their son, CYS restricted them to a room approximately 4′ x 8′; when the parents asked to have Steven baptized, CYS refused to grant permission; when the parents asked CYS if they could take their child for walks or a visit to their home, CYS refused; when the parents brought toys, the foster parents refused to accept the toys; on Steven's birthday the mother baked a cake but was told that food was forbidden; when the parents visited they were always under video surveillance.

When the father discussed with his son his school work, his health, etc., and what they would do together when reunited, Linda Burgason, the caseworker, told him that he "acted too much like a family with Steven" and she wanted this to "cease immediately" or she would take

it to Court and "stop my visits and she could almost guarantee me that I would never see my son again" -- which she did.

Burgason testified that her differences with the father arose because the father discussed matters relating to the "welfare of the children" which she presumed was a matter delegated to CYS. The father worked with 45 different caseworkers making it difficult to maintain any continuity.

The father attended various programs recommended by CYS but when the agencies told him that they could not do anything for him unless he first admitted that he had injured his son the programs were discontinued and his refusal was considered by CYS and the lower Court as another reason why his rights were terminated. When the father, in order to meet CYS' directives, sought counseling

from an independent reputable psychologist, CYS informed him that it would not approve his participation.

Linda Burgason testified that the father did not want Steven to refer to his foster parents as his "mother" and "father". Burgason instructed Steven that he had a "mom and dad that he lived with" and "that he had a mom and dad that visited him". Another caseworker (Miss Shelly) referred to the father in the presence of Steven as his "birth father" and as a "friend".

After the father's visiting privileges were terminated by CYS at the behest of Burgason, the father's mail to his son was returned by the foster parents. All mail was returned by the foster parents. The father refused to forward the mail to CYS for their approval as directed by them since he

felt that CYS had no right to censor his mail, particularly since CYS forbade any discussions dealing with the welfare of the child. But CYS and the Court below used his failure to refer his correspondence to CYS for approval as another reason for terminating his parental rights.

Judge Wettick terminated the father's visitation in reliance upon the testimony of Dr. Mannarino. It is evident that neither Dr. Mannarino nor the court considered the legal reunification requirements seriously or at all:

Dr. Mannarino: (pp. 27-35)
Cross examination by Mr. Hahalyak
Q. Now, as I understand it, you are in favor of having this child adopted. Is that right?

A.I think that is in his best interest.
Q. Is that what your position has been and your purpose in this matter? Right?

A. It's not my purpose. It's my recommendation.

Q. The foster parents gave you a bit of information on which you relied, and CYS wants to see that the child is adopted. Is that correct?

A. That is my understanding.

Q. Doesn't the law require that the two of you, except for the foster parents, see to it that the child is brought back to the natural parents, and every effort be made

THE COURT: The law doesn't require him to do anyting. He is not -- He's just an expert witness.

MR. HAHALYAK: Don't you consider that as he aspect of the law that puts that demand on the parties that have engaged you?

MS. PATTERSON: Objection. The witness is not an attorney and doesn't.

THE COURT: Finish the question.

MR. HAHALYAK: Could the reporter repeat the question?

MR. HAHALYAK: --toward reconciliation of the child with the natural parents.

THE WITNESS: That may be the law, but that's not my job. That's not my job.

My job is to determine what is in the best interest of the child.

MR. HAHALYAK: So there may be a conflict in what the law demands and what you feel your job is.
Right?

MS. CRAIG: He is not a lawyer.

THE COURT: I will sustain the objection.

MR. HAHALYAK: I think it is very important, but I will move on.

THE COURT: If what you are getting at is does this recommendation that there be no visits with the child make reconciliation more difficult -

THE WITNESS: It does. You must with the natural parents?

BY MRS. PATTERSON (Direct):
Q. You believed the best interest of this child would be best served by his adoption by the family with whom he is living?

A. Absolutely, and that isn't a commentary to you about the natural parents. It's just a commentary that he has been with these people for over five years and he identifies them as caretakers in every sense.

THE COURT: You are not describing any-thing that is happening at the visitation as anything outrageous; are you?

THE WITNESS: I am not saying anything negative.

THE COURT: <u>You are just saying they come and appear as a family and act the way a family does. And that in and of itself poses a big threat</u>? (emphasis)

The possibility that the child

wasn't having some problems with regard to that in the past is simply due to the fact that he was younger and didn't even understand the possibility around that issue in the same way he understands it today.

BY MS. PATTERSON:
Q. So you see the continuation of this kind of thing as being really harmful to Steven? (emphasis added)

A. Absolutely."

Although the law requires CYS to seek to unify the family first, CYS, its expert and the court failed to recognize this legal requirement. When family ties began to develop, Burgason caused CYS to move for termination, calling Dr. Mannarino as its expert. Parental rights were terminated although the conditions which led to the removal required to be present under the Statute were no longer present - the father was stipulated to be not dangerous and the court admitted that his four children were appropriately reared.

REASON FOR GRANTING THE WRIT

THIS CASE CONCERNS THE UNCONSTITUTIONAL EXERCISE OF POWER BY CYS AND ITS APPROVAL BY THE COURT BELOW SO AS TO RENDER THE STATUTE AUTHORIZING TERMINATION UNCONSTITUTIONAL IN ITS INTERPRETATION AND APPLICATION. BECAUSE OF THE TRAGIC IMPACT OF THIS POWER ON HUMAN LIVES, CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS DURING CUSTODIAL PERIODS IS SORELY NEEDED TO BE DEFINED IN PARENTAL TERMINATION CASES. THE REASON IS APPARENT. THE AGENCIES' PRIMARY DUTY IS TO REUNIFY THE FAMILY AND HEAL THE WOUNDS. IT HAS INSTEAD BECOME A "SUPER PARENT" LAYING DOWN BUREAUCRATIC RULES, THE BREACH OF WHICH ALONE IS SUFFICIENT (SOLE CRITERION) TO TERMINATE PETITIONERS' PARENTAL RIGHTS, AS OCCURRED IN THIS CASE, DESPITE THE FACT THAT THE PARENTS WERE SIMULTANEOUSLY RAISING THEIR FOUR MINOR CHILDREN AT HOME IN AN

EXEMPLARY MANNER AND DESPITE THE FACT THAT THIS COURT STATED THAT TERMINATION WOULD APPEAR UNCONSTITUTIONAL WHERE THE PARENT IS FIT AND WHERE THE SOLE REASON GIVEN IS THE "BEST INTEREST" OF THE CHILD. THE COURT BELOW FOUND THE "BEST INTEREST" OF THE CHILD WAS TERMINATION BECAUSE OF LACK OF FAMILY TIES - A SITUATION CREATED BY CYS ITSELF WHICH BY ITS OWN ARBITRARY RULES LIMITED PETITIONERS TO A TOTAL OF 26 HOURS OF VISITATION PER YEAR. THIS COURT SHOULD DECIDE WHETHER IN ANY PARENTAL TERMINATION CASE THE SOCIAL AGENCY MUST BEAR THE BURDEN OF PROVING AS A CONSTITUTIONAL PREREQUISITE TO A TERMINATION ORDER: (1) THAT THE SOCIAL AGENCY OFFERED REASONABLE AVENUES OF REUNIFICATION, PARTICULARLY REASONABLE VISITATION RIGHTS, AS TO TIME, PLACE, ETC., AND (2) THAT PARENTAL RIGHTS CANNOT BE CONSTITUTIONALLY

TERMINATED WHERE THE PARENT IS SHOWN TO BE A FIT PARENT REGARDLESS OF ALLEGED BREACHES OF BUREAUCRATIC RULES.

This nation is confronted with a serious problem - the breakup of the family and the rising governmental costs resulting from a broken family. This problem has been seriously multiplied by governmental agencies which, although charged under the law with unifying the family, have, because of lack of constitutional guidelines, assumed unconstitutional powers like unto "super parents", resulting in the tragic separation of children from their parents, in the institutionalization and dehumanization of children, in rising government costs to support the unlawful activities of these agencies and, more importantly, in the erosion of basic parental rights guaranteed under the 14th

Amendment.

In his dissenting opinion Justice Cirillo described the conduct of CYS and the acceptance by the lower court of CYS' biased recommendations as a manifest abuse of discretion. We submit that this excess bureaucratic power reflected itself in the social agencies' and the court's unconstitutional interpretation and application of the statute authorizing termination. This abuse now requires the placing of constitutional boundaries on social agencies seeking parental termination. The Juvenile Courts have not acted to curb this abuse of power. The reason may be that there is too close an association between such agencies and the Juvenile Court. Although reunification is mandated under the law it has been ignored by CYS. To permit agencies to continue their unlicensed

activities is to give free rein to bureaucractic rules which insidiously invade constitutionally protected parental rights, the integrity of the family and the very foundations of a stable society.

The constitutionality of the statute because of vagueness, etc. had not been raised by petitioners since a review of the decided cases covering this aspect of the statute indicates that there are sufficient criteria in the statute which, according to the case law, are not vague -- if properly followed. Petitioners instead attack the statute as being unconstitutionally interpreted and applied in that the Court disregarded clear proof that the parents were fit parents as demonstrated by their exemplary rearing of their four minor children, disregarded the agency's

unconstitutional restrictions on visitation and accepted breaches of bureaucratic regulations as the sole criterion for termination.

The court substituted CYS' speculative bureaucratic criteria in place of the demonstrated proof that the parents were fit. This error is expressed in the opinion of Judge Wettick when he stated (p.110) "it may have been possible for the parents to have met the reunification requirements <u>if there had been more cooperation between the parents and CYS</u>". Thus compliance with the agencies' bureaucratic criteria became an important condition precedent to petitioners' continuing parenthood while the proven fitness of the parents in caring for their four children at home was rendered meaningless. This bureaucratic criteria as the determiner of parental rights

violates this Court's statement that parental fitness is a factor of constitutional significance in parental termination cases. The idea that the government may supersede parental authority in order to ensure bureaucratically or judicially determined "best interests" of children has been rejected as repugnant to American traditions. Parham v. J.R., 442 U.S. 584, 603, 99 S. Ct. 2493, 2504, 61 L.Ed.2d 101, 119 (1979); accord Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923) (noting the models of Aristotelian guardianship and Spartan state collectivization of youth and rejecting those models as antithetical to American freedoms).

This Court is now called upon to decide what it has repeatedly stated by way of dicta or suggestion, to-wit, that a showing of "unfitness of the parents"

is a constitutional requirement to warrant termination of parental rights. This was suggestively raised in Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 554-55, 54 L.Ed.2d 511, 520 (1978) and in Smith v. Organization of Foster Families, 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977) this court said:

"If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter'". (Underlining supplied)

We submit that only by making "unfitness" of the parents and not soley the best interests of the child a constitutional condition precedent to termination of parental rights will the abuses by government agencies be better con-

trolled. The magnitude of the problem and its impact on human lives (termination of parenthood is analogous to the death of the child) requires that this Court establish in clear language this constitutional basis of the required proof.

One reason for the termination order is that the father, by refusing to admit to having abused his child refused to cooperate with CYS and thus failed to take the required bureaucratic curricula that would have taught him the necessary parenting skills that would have allegedly prepared him to be a fit parent. This is an arbitrary assumption since the parents by successfully rearing their four minor children have proven beyond any doubt their <u>fitness</u> as parents and, insofar as an alleged abuse of children, the parties stipulated that the

father was not a dangerous person and all tests, including his background record, confirmed that he was not dangerous.

We submit further that the court below applied the statute unconstitutionally in that under the 14th Amendment the parental rights of petitioners were violated by the regulatory restrictions imposed upon the parents by CYS and most importantly by the court's failure to consider the fitness of the parents as a constitutional bar to termination of parental rights. Judge Wettick conceded in his memorandum (p. 109) that the parents appeared to have provided "appropriate care" to the four children.

The decision in this case is in conflict with the decisions of this Court. In Alsager v. District Court, 406 F. Supp. 10, 22 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976) the state's

interest in protecting children must be balanced against the parents countervailing right to raise their children without government interference. Freedom of personal choice in matters of family life, and the concomitant freedom from unwarranted governmental intrusion, is a fundamental liberty interest protected by the Fourteenth Amendment. Santosky v.Kramer, 455 U.S. 745, 1025 S.Ct. 1388, 71 L.Ed.2d 599 (1982). This Court has uniformly recognized that the integrity of the family and a parent's right to raise his or her child are fundamental interests and thus subject to the highest degree of constitutional protection. Wisconsin v. Yoder, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972) (acknowledging primary role of parents in upbringing of their children); Stanley v. Illinois, 405 U.S. 645, 651,

92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972) (interest of a man in his children warrants deference and protection); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (parents have primary rights and responsibilities in custody, care and nurture of children; Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (marriage and procreation "fundamental" civil rights); Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (recognizing parental right to guide destiny of the child); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625. 67 L.Ed 1042 (1923) (liberty interest of 14th amendment without doubt protects as "essential", right to bring up children.

CONCLUSION

For the foregoing *reasons*, Petitioner prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania in this case.

Respectfully submitted,

Michael Hanalyak, Esquire
Counsel for Petitioners
2210 Clark Building
Pittsburgh, Pa. 15222
(412) 261-2001

June 9,1993

JOINDER

Counsel for the mother, J.M.S., joins in the above petition.

Mary Alice Mulock
Counsel for the Mother
2210 Clark Building
Pittsburgh, Pa. 15222
(412) 261-2001

IN RE:ADOPTION OF STEVEN S., a minor

IN THE SUPERIOR COURT OF PA.

APPEAL OF R.S.

No. 1317 PGH, 1991

Appeal from the Order Entered June 29, 1991, in the Court of Common Pleas of Allegheny County, Orphans' Court Division, at No. 260 of 1986.

BEFORE: ROWLEY, P.M., and CIRILLO and BROSKY, JJ.

OPINION BY ROWLEY, P.J.: FILED: July 7, 1992

In these related appeals, R.S. ("Father") and J.M.S. ("Mother") appeal from the final judgment[2] terminating their parental rights with regard to their son, Steven. In his appeal, docketed in this Court at No. 1317 Pittsburgh, 1991 Father raises the

[2]The trial court entered an order and final judgment, rather than a decree nisi and final decree.

following issues: (1) whether Children and Youth Services elements to entitle it to terminate the parental rights of the father in that the alleged conditions which led to the removal or placement of the child do not exist; (2) whether C&YS illegally, arbitrarily, and unconstitutionally restricted his visitation rights, delayed the return of the child to his natural family, and failed to promote reunification of the family; (3)whether the trial court erred in applying the bonding principle and the best interests of the child approach so as to deny Father his parental rights; and (4) whether the trial court misinterpreted the recommendation of the expert psychologist in finding that the child should not be returned unless he himself favors the return. In her appeal, docketed at No. 1335 Pittsburgh

1991, Mother raises the following issues: (1) whether the trial court erred in determining that grounds for termination of her parental rights were supported by clear and convincing evidence, and (2) whether the trial court erred in determining that termination of her parental rights will best serve the child's needs and welfare. After thoroughly reviewing the record and considering the arguments of the parties, we affirm.

Mother and Father were married in 1981. Father had a son and a daughter from a previous marriage. Mother and Father have four other children, including Steven. Both Steven and the son from Father's previous marriage reside in foster homes. The other four children reside with Mother and Father. Steven was born on May 17, 1983. On June

21, 1983, Steven's parents took him to Suburban General Hospital where he was treated for a broken leg. Because the hospital personnel found the nature of the fracture to be inconsistent with the parents' explanation of the cause, C&YS was notified concerning possible abuse. A Juvenile Court hearing was conducted, after which Steven was returned to his parents.

Approximately one month later, a visiting nurse found Steven to be in an extremely emaciated condition. A C&YS caseworker obtained an ex parte court order permitting her to take Steven to the hospital. The emergency room physician diagnosed Steven as suffering from malnutrition. He remained in the hospital for five days and was then placed in a temporary foster home. In September, 1983, he was found to be

dependent and placed in a regular foster home, where he now resides. His foster parents wish to adopt him.

In August, 1986, CY&S filed a petition for the involuntary termination of Mother's and Father's parental rights. Hearings on the petition were conducted, and on May 3, 1991, the trial court entered an order terminating Mother's and Father's parental rights. Exceptions were denied on June 29, 1991, and the order was made final. These appeals were then filed.

Termination of appellants' parental rights was based on 23 Pa.C.S. Section 2511 (a)(5), which provides the following:

> The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:
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> **********
>
> (5) The child has been removed from the care of the parent by the court or under a voluntary

agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

23 Pa.C.S. Section 2511 (a)(5).
A party seeking involuntary termination of parental rights must prove the above five elements by clear and convincing evidence. In re Adoption of J.J., 511 Pa. 590, 594, 515 A.2d 883, 885-86 (1986). In reviewing the trial court's decision to grant the petition to terminate, the scope of appellate review is limited to the determination of whether the decree of termination is supported by competent evidence. If the decree is adequately supported by competent evidence, and the chancellor's findings are not predicated upon capricious disbelief of competent and credible evidence, the adjudication of the Orphans' Court terminating parental rights will not be disturbed on appeal [...] [U]nless the Orphan's Court abused its discretion or committed an error of law, its findings are entitled to the same weight given a jury verdict. The trial court, as trier of fact, is the sole judge of credibility of witnesses. Conflicts in testimony are to be resolved by the trier of fact, is the sole judge

of credibility of witnesses. Conflicts in testimony are to be resolved by the trier of fact and we may not disturb a decree of Orphans' Court based upon findings supported by the record unless Orphans' Court applies an incorrect legal standard.

In re Adoption of B.J.R., 397 Pa.Super. 11, 15, 579 A.2d 906, 908 (1990) (quoting Adoption of J.J., supra at 593-94, 515 A.2d at 885-86 (citations omitted)).

With these standards in mind, we have thoroughly reviewed the record and conclude that the trial court did not err in granting the petition to terminate. On the basis of the testimony and evidence presented at the hearing, see Trial Court Opinion at 3-23, the trial court made the following factual findings and conclusions from those findings:

The two incidents that led to Steven's removal established that his home environment seriously jeopardized Steven's health and safety. In September, 1983, Steven was found to be a dependent child requiring placement outside the home because of inadequate explanations for bruises on his face

and a leg fracture and because of a dramatic weight loss and malnourishment for which there was no reasonable explanation other than neglect.

C&YS's reunification requirements were reasonable. The incidents that led to Steven's removal strongly suggested that Steven's birth had disrupted the functioning of this family. Consequently it was reasonable for C&YS to require the parents to complete a MHMR assessment and to complete any counseling which the assessment recommended as a condition for Steven's return. To date, the family has not been willing to permit such an assessment.

It was also reasonable for C&YS to require the parents to participate in a program that addressed parenting skills and child developmental issues and that evaluated the parents' abilities to relate to and to care for Steven. It was approximately two years before the parents were willing to participate in such a program. At that time, the staff of this program concluded that they were not capable of responding to Steven's needs.

With the passage of time during which Steven remained outside the home, the need for successful parental participation in a program designed to assist the parents in responding to Steven's needs increased. Because Steven is being raised in a foster home, he has come to view the foster parents as his parents and his natural parents have become insignificant. Consequently, it is difficult for his parents to re-

establish a relationship with Steven without the assistance of professionals who are capable of assisting the parents in understanding the child's views and needs and the manner in which they must respond. This is an area in which the parents have made no progress because of their inability to work with professionals and to understand Steven's situation.

This case is unusual in that there are presently four other children in the [S.] home. The children appear to be doing well in a family that appears to be providing appropriate care. This suggests that it may have been possible for the parents to have met the reunification requirements if there had been more cooperation between the parents and relationship between the father and C&YS resulted in the issues leading to Steven's removal being no more resolved today than they were at the time of the removal.

From the outset, the father's response to C&YS was one of complete mistrust, an unwillingness to believe that there was any justification for Steven's removal, and an insistence that matters be done his way because C&YS's methods were based on its bureaucratic needs rather than the needs of the parents and their children[3]. C&YS's caseworkers

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[3] For example, although the parents knew that C&YS required all letters and cards to Steven to be sent through C&YS rather than directly to Steven, they insisted on repeatedly

viewed the father's responses as a *validation of their beliefs* that his personality traits prevented him from being a competent parent for Steven. They responded to the father's attacks on C&YS by assuming a defensive position.

They have not successfully completed any programs that would assist them in understanding the needs of a seven year old child who has lived his entire life with another family. They have not shown any ability to following the suggestions of any professionals with respect to their responses to Steven.

Trial Court Opinion at 23-27. After reviewing the record, we concluded that the trial court's factual findings and its resolutions of factual disputes, upon

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sending cards and letters directly to Steven at his foster home. Pursuant to C&YS directives, the foster parents refused these cards and letters. As a result, Steven never received them. Because the letters and cards were returned to the natural parents, they knew that their failure to follow C&YS policy resulted in the loss of any benefit these cards and letters may have provided to Steven and to their relationship with him. Nonetheless, they refused to abide by C&YS policy. Although this is a relatively minor infraction, it reveals the parent's refusal to place Steven's needs above their own.

which the above conclusions are based, are amply supported by the record. With this in mind, we will address the parent's arguments.

I. FATHER'S APPEAL

In his first issue, Father contends that C&YS failed to satisfy the necessary statutory elements by clear and convincing evidence. Specifically, he argues that C&YS "produced no testimony whatsoever to establish that the alleged propensities on the part of the father to abuse the child (all of which he always denied) 'continued to exist'." Father's Brief at 33.

It is true, as Father contends, that C&YS caseworkers stated that the was not a dangerous person, that the trial court remarked that he was fit to be around children, and that psychological tests did not reveal a propensity for child

abuse. See id. at 33. Nonetheless, sufficient evidence was presented which clearly and convincingly revealed that Steven did not receive adequate care during the first two months of his life.

Although the parents have repeatedly and continually denied abusing or neglecting Steven, this factual dispute has been decided against them. After viewing the evidence of record, most notably the evidence reflecting Steven's physical condition when he was removed, we cannot say that the determinations concerning abuse and neglect lack support. Moreover, their failure to remedy these problems within the past eight years, indeed their failure to acknowledge these problems in the fact of overwhelming

failed to promote reunification of the family. We have reviewed the record and find these assertions to be unfounded. Rather, the record reveals that C&YS's initial goal was to reunite the family and services were offered to appellants in an attempt to reach that goal. However, because appellants did not available themselves of those services, and accordingly, the conditions leading to Steven's removal were not remedied, C&YS's goal was changed to adoption. However, even after the goal was changed to adoption, C&YS advised appellants that the adoption recommendation would be revised if appellants became more involved and made progress towards meeting Steven's needs. In addition, C&YS told appellants that it would not refer the case to the Adoption Department in order to provide yet another

opportunity to them to "make diligent efforts toward the reasonably prompt assumption of full parental responsibilities." In re J.W., 3396 Pa. Super. 379, 392, 578 A.2d 952, 959 (1990). Although appellants did then attend the Parental Stress program, their sessions were terminated due to a lack of progress and because of the adverse effects visits were having on Steven.[5]

In a situation much as that presented in this case, both the parents and C&YS have duties to promote reunification.

> [The parents'] 'affirmative duty,' at minimum, requires a showing by the parent of a willingness to cooperate with any agency to obtain the rehabili-

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[5] We note that appellants apparently contacted other social service agencies which provided other parenting programs. According to Father, C&YS refused to approve appellants' participation in these agencies. According to the caseworkers, these agencies were not appropriate for this case.

tative service necessary for the performance of parental duties and responsibilities. The agency must, of course, put forth a good faith effort in making services available to the parent, and once it has done so on a continuing basis, it has discharged this obligation.

Adoption of J.J., supra at 602, 515 A.2d at 890 (emphasis omitted). We have thoroughly reviewed appellant's arguments as well as the evidence of record and have found nothing from which we could conclude that Steven's return to the family will be possible within a reasonable period of time where eight years have passed and no progress toward this goal has been made. Although the fact that Father and Mother have successfully been raising four other children is evidence that they do possess parenting skills, it does not negate the fact that they were not properly caring for Steven. Their apparent parental abilities with respect to their four

other children also did not obviate the need to identify and remedy the problems leading to Steven's removal. The parents' unwillingness to recognize and confront these problems has made any improvement virtually impossible. See In re Adoption of Embick, 351 Pa. Super. 491, 516-17, 506 A.2d 455, 469 (1986) (parents' "attitude is one of resistance predicated upon the erroneous notion that they are capable parents and need no outside assistance"), allocatur denied, 513 Pa. 634,m 520 A.2d 1385 (1987). "[Steven] should now be given the opportunity to extricate [himself] from the transitional state of foster . . . care, and establish a true parent-child relationship through adoption." Id. at 520, 506 A.2d at 471.

Father also asserts that the trial court improperly based its decision on

the fact that Steven is bonded to his foster parents and not his natural parents. In support of his allegation of error, Father cites a case involving custody, In re Donna W., 325 Pa.Super. 39, 472 A.2d 635 (1984) (en banc). In Donna, an en banc panel of this Court rejected a 'psychological bonding presumption," that is, a presumption, "as a matter of law[,] that where the evidence discloses strong 'psychological bonding' to the foster parents, an award to the natural parent is contrary to the children's best interests." Id. at 57, 472 A.2d at 644. it is true, as Father asserts, that the trial court considered the bonding which Steven has with his foster family. The trial court did not, however, apply the bonding principle to an impermissible degree. Specifically, the trial court found:

that the termination of parental rights of Steven's father and mother will best serve the needs and welfare of Steven.

Steven has resided in his foster home for more than seven years. He regards the foster family as his family. He has adjusted well to the home -- he is described as a very nice and well-functioning youngster. The possibility that he might be removed from this home creates a significant pain and stress.

The foster parents wish to adopt. Steven has almost no relationship with his natural parents so termination will not disrupt an existing parent-child relation. Adoption by the foster parents, on the other hand, will give legal recognition to a family which in every important sense already exists.

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It is clear that Steven's return to his natural family would be contrary to Steven's best interests. Even the expert witness whom the parents presented testified that Steven should not be returned unless Steven favors the return.

The options proposed to this court by the two professionals are either to give Steven a permanent home with his foster parents or to leave Steven in the foster home as a foster child because of the possibi- lity that as he grows older he may wish to establish a relationship with his natural parents. For the reasons previously discussed, the first option will best serve Steven's needs and welfare.

Trial Court Opinion at 23-24, 27-28 (footnote omitted). The trial court has thoroughly considered the evidence of record and has properly concluded that Steven's welfare will be best served by termination. it would be detrimental and unfair to Steven to permit the situation to continue as it has, where eight years has passed with no progress and where it does not appear that the situation will change due to the parents' unwillingness to acknowledge their problems and work towards a solution. Under these circumstances, the trial court properly determined that termination will best serve Steven's needs and welfare.

Furthermore, while the facts of Donna are somewhat similar to the facts of the present case, Donna does not control the outcome of this case. As Father asserts, the Court in Donna did

not place much weight on the fact that there was little interaction between the mother and her children during their visits, which were supervised by a caseworker and a foster parent. In the present case, more than "little interaction" is present. Father's visitation rights were terminated because of the adverse effects they were having on Steven. In addition, the mother in Donna was willing to work with agencies recommended by C&YS in order to learn to deal with her daughter's problems. Finally, the court in Donna recognized that in considering the importance of stability to a child's welfare, the reasons why the child has been with the third party for so long must be taken into account. Id. at 61, 472 A.2d at 646. In Donna, the child had been in foster care for five years. However, for

four of the five years the mother had been trying to regain custody of her child, and the delay was caused in large part by the courts. In the present case, Steven has been in foster care for eight years because of the lack of progress on the part of appellants. For these reasons, Donna is distinguishable from the present case.

Additionally, Father contends that the trial court improperly applied the best interests of the child approach. In a termination case, the trial court must not apply a best interests analysis in the sense of balancing the foster home and the natural parents' home. See In re Coast, 385 Pa. Super. 450, 561 A.2d 762 (1989) (en banc), allocatur denied, 525 Pa. 593, 575 A.2d 560 (199). However, the trial court must, as it did in the present case, consider the child's needs

and welfare. Although the trial court used the term "best interests" at one place in its opinion, see Trial Court Opinion at 27, it did not employ a best interests/weighing of the families analysis.

In his final issue, Father argues that the trial court misinterpreted the testimony of appellants' exert witness, Dr. Bansavage, that Steven should not be returned to his natural parents unless he favors it. We summarily reject Father's assertion that the trial court interpreted Dr. Bansavage's testimony to mean that "the child would decide the matter." Father's Brief at 42. Furthermore, the trial court accurately summarized the substance of Dr. Bansavage's testimony in its opinion. See Trial Court Opinion at 17-20. Moreover, Dr. Bansavage did in fact

testify that in order for Steven to be successfully returned to his natural parents, he would need "proper counseling and a desire to return." Notes of Testimony, 11/13/90, at 31. He also stated that although he did not recommend termination, he "would not force (reunification) at the present time" in light of the fact that Steven did not appear to want reunification. Id. at 32. We conclude that Father's allegation of error is meritless.

II. MOTHERS'S APPEAL

We will now address the issues Mother raises in her brief. She first contends that the trial court erred in finding that sufficient grounds for termination of her rights were supported by clear and convincing evidence. She contends that "the conditions leading to the removal of the children [sic] do not

remain in effect since some of the conditions pertaining to the inadequate housing have indisputably been remedied and the difficulties involved in the feeding and caring for an infant who is in a body cast are no longer present." Mother's Brief at 9. This argument misrepresents the nature of the problem, however. Steven was not removed from the natural parents' home merely because of inadequate housing and the difficulties resulting from his cast. Steven was removed from the home because he was receiving inadequate care. Steven was extremely malnourished, bruised, and suffering from a broken leg. Appellants' failure to acknowledge their parental inadequacies and to attempt to remedy them reveals that the conditions leading to Steven's removal are, as the trial court found, still present. Steven's

physical condition when he was removed was a symptom of an underlying problem. Because that problem has not been identified or resolved, the conditions leading to Steven's removal have not been remedied.

Mother also argues that it is "not proper to deny [her] her parental rights because of any difficulties which her husband may have had in dealing with Children and Youth Services." Mother's Brief at 10. It is true that Mother's relationship with C&YS has not been antagonistic as has Father's. It is also true that Mother's visitation with Steven was not terminated as was Father's. However, it is also true that Mother has not shown a willingness to meaningfully participate in the services offered by C&YS and to develop the skills and the insights which are necessary for Steven's

return.

As to Mother's second issue, namely, whether termination will best serve Steven's needs and welfare, we have already discussed our agreement with the trial court's conclusions.

For the above reasons, we conclude that the trial court properly concluded that the requirements of section 2511(a)(5) have been proven by clear and convincing evidence. We therefore affirm the final judgment.

Final judgment affirmed.

CIRILLO, J., files a
DISSENTING OPINION.

IN RE:ADOPTION OF STEVEN S., a minor **IN THE SUPERIOR COURT OF PA.**

APPEAL OF R.S.
No.1317 PGH,1991

Appeal from the Order entered June 29, 1991 in the Court of Common Pleas of Allegheny County, Orphans' Court Division, at No. 260 of 1986

IN RE:ADOPTION OF STEVEN S., a minor **IN THE SUPERIOR COURT OF PA.**

APPEAL OF J.M.S.
No.1335PGH, 1991

Appeal from the Order entered June 29, 1991 in the Court of Common Pleas of Allegheny County, Orphans' Court Division, at No. 260 of 1986

BEFORE: ROWLEY, P.J., and CIRILLO and BROSKY, JJ.

DISSENTING OPINION BY CIRILLO, J.:
FILED: July 7, 1992

I must respectfully dissent. After a careful review of the record, I find that Children and Youth Services (CYS) did not prove by clear and convincing evidence that the natural parents are

unable and unwilling to remedy the conditions that led to the removal of their son from their care.

Steven S. was removed from his parental home when he was two months old. He has not yet been returned to his parents. The trial court, in its opinion, stated that '[t]he incidents that led to Steven's removal strongly suggested that Steven's birth had disrupted the functioning of this family." Steven is now nine years old. It strains credulity to suggest that the same stress and disruption caused by a newborn's constant need for attention exists today. The trial court clearly states that 'this case is unusual in that there are presently four other children in the home. The children appear to be doing well in a family that appears to be providing appropriate care." Moreover,

the majority readily admits that "C&YS caseworkers stated that [the father] was fit to be around children, and that psychological tests did not reveal a propensity for child abuse."

To me, this case is a testament to an agency that has lost sight of its mission. Steven was removed from his home under authority conferred by the Juvenile Act, 42 Pa.C.S.A. Section 6301 et seq. The primary purpose of the Juvenile Act is to "preserve the unity of the family whenever possible and to provide for the care, protection and wholesome mental development of children . . . ." 42 Pa.C.S.A. Section 6301 (b)(1) (emphasis added). This court has clearly established that "[a]ny decision to remove the child from his home must be reconciled with the paramount purpose of preserving the unity of the family." In

Re Angry, 361 Pa. Super. 180, 184, 522 A.2d 73, ___ (1987), quoting In Re Frank W.D., 315 Pa. Super 510, 518 462 A.2d 708, 712 (1983); Interest of LaRue, 244 Pa. Super. 218, 366 A.2d 1271 (1976). In order to insure that the goals of the Juvenile Act are carrier out, our legislature mandated that a disposition review hearing be conducted at specified intervals "for the purpose of determining whether placement continues to be best suited to the protection and physical, mental and moral welfare of the child." 42 Pa.C.S.A. Section 6351 (e). Despite the unequivocal goal of the Juvenile Act, the procedural safeguards incorporated in that legislation, and the emphasis on preservation of the family evident in the case law of the Commonwealth, Steven has been separated from his family, over their strenuous objections, for nearly

nine years. Under the circumstances of this case, I find such an extended separation counterproductive and utterly without justification.

The record reveals that there was a constant, antagonistic relationship between CYS and Steven's father. According to the trial court, the father insisted that 'matters be done his way because CYS's methods were based on its bureaucratic needs rather than on the needs of the parents and their children. C&YS's caseworkers viewed the father's responses as a validation of their beliefs that his personality traits prevented him from being a competent parent for Steven. They responded to the father's attacks on C&YS by assuming a defensive position."

C&YS is the state social service agency charged with the responsibility of

facilitating reunification of families whose children have been temporarily removed. CYS is ostensibly staffed by professionals -- dispassionate individuals trained to work with parents in order to improve the situation which necessitated the removal of their child. For presumably trained social workers to react defensively and destroy a distraught father's antagonism toward bureaucracy into justification for separating a child from his parents for nearly nine years is reprehensible indeed. For a trial court to involuntarily terminate the parental rights of the natural father and mother on the basis of the prolonged separation and CYS's biased recommendation constitutes a manifest abuse of discretion.

I would reverse the trial court's

order involuntarily terminating the Schoenfelds' parental rights to their son Steven. The Schoenfelds are competent parents; the admitted well-being of the four children currently residing with them attests to their parenting abilities. I cannot condone punishing the parents by depriving them of their son because of the wanton lack of professionalism exhibited by CYS in its handling of this case.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

IN RE: Adoption of Steven
S., a minor
No1317 PGH, 1991

APPEAL OF R.S.

IN RE: Adoption of Steven
S., a minor
No1315 PGH, 1991

APPEAL OF J.M.S.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby AFFIRMED.

Cirillo, J., files a Dissenting Opinion.

BY THE COURT:

DEPUTY PROTHONOTARY

DATE: July 7, 1992

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

In re: Adoption of S.S., a Minor
Petition of R.L.S. and
J.M.S.
No. 0401 W.D. Allocatur
Docket 1992

ORDER

March 17, 1993
PER CURIAM;
Petition Denied.

DEPUTY PROTHONOTARY

IN RE: ADOPTION STEVEN S., a minor

IN THE COURT OF COMMON PLEAS OF ALLEGHENY CTY, PA.

APPEAL OF R.S. **No. 260 of 1986**

FILED: May 3, 1991

MEMORANDUM OPINION

Wettick, J.

This is a petition filed by Children and youth Services (C&YS) to terminate the parental rights of the mother and the father of Steven James Schoenfeld (date of birth -- May 17, 1983).

I. FACTUAL BACKGROUND

Steven's mother and father were married in September 1981. They continue to be married and have resided together throughout their marriage.

The father was previously married. He has a daughter (Diana) and a son (Robert) from his prior marriage. Diana (age 14) has never been the subject of

any dependency proceedings. She presently lives with her father and stepmother. Robert (age 12) has been outside the home as a dependent child since November 1983. Prior to his removal, he lived with his father and stepmother.

Steven is the second oldest child of the mother and the father. They have three other children: Audrey - age 9, Amanda - date of birth - April 1989, and Jeremy - date of birth - September 1990. None of these three children has been the subject of any dependency proceedings.

On June 21, 1983, Steven was admitted to Suburban General Hospital because of a broken leg. C&YS sought to remove the child from his parents upon his release from the hospital because of information provided to the caseworker from hospital personnel that the parents

did not offer a satisfactory explanation for the injury. At a shelter hearing, the Juvenile Court refused to remove the child.

Following Steven's discharge from the hospital, he was in a body cast. He resided with his parents until July 21, 1983. On that date, a C&YS caseworker obtained an ex parte court order permitting her to take Steven to Children's Hospital. She based her request for the court order on information from a visiting nurse that she had seen the child in the parents' home on July 20, 1991 and that the child was extremely emaciated. The emergency room physician at Children's Hospital admitted the child to the hospital because of malnutrition. The child remained in the hospital until July 25, 1983. At that time, the child was placed

in a temporary foster home.

In September 1983, Steven was found to be dependent because of both incidents and C&YS was given permission to place him in a regular foster- home. On November 23, 1983, Steven was placed in a regular foster home. He continues to reside in this home. The foster parents wish to adopt if Steven's parental rights are terminated.

In August 1986, C&YS filed a petition for the involuntary termination of the parents' rights. The Orphans' Court judge to whom the case was assigned did not schedule a hearing because he apparently first wished to resolve the termination proceedings involving Robert Schoenfeld. In the fall of 1989, I learned that the termination petition had been reassigned to me because I was the Juvenile Court judge to

whom the Schoenfeld proceedings were assigned. I promptly scheduled a pretrial conference. At the conference, I scheduled the case for trial. However, trial dates were continued on several occasions because of requests of the parents' counsel based on scheduling conflicts and additional time for their expert (Dr. Bansavage) to complete his evaluations. Following the June 30, 1990 hearing, I scheduled a second trial date which was continued on two occasions at the request of the parents' counsel because of the unavailability of the parents' expert until the early fall of 1990 and the birth of the parents' youngest child. After the conclusion of the testimony, there was an additionally delay of several months because of the unavailability of the transcripts.

II. SUMMARY OF TRIAL TESTIMONY

A.

C&YS presented the following witnesses:

SONIA THOMAS

Ms. Thomas was employed as a C&YS caseworker for two and a half years beginning in 1981. Steven's case was referred to her on June 21, 1983 upon his admission to Suburban General Hospital. The referral was made because hospital personnel believed that the injuries did not appear to be consistent with the parents' explanations. Ms. Thomas saw the child at the hospital. She testified that there were bruises on Steven's face.

Ms. Thomas filed an indicated abuse report. She also scheduled a shelter hearing. At the shelter hearing, the court ruled that Steven would return to his mother and his father under C&YS supervision upon his release from the

hospital. This obviously, did not preclude C&YS from proceeding with its dependency petition.

Ms. Thomas was the family caseworker from the date of the initial incident (June 1983) until she left the agency (November 1983. The family service plan that she prepared provided for the parents to receive counseling at Northern Communities. She also requested the parents to enroll in the Parental Stress Center Program.

BETH HUFNAGEL

Ms. Hufnagle was employed at C&YS from October 1982 to April 1984 and from November 1988 to October 1989. She supervised Steven's placement in the temporary foster home from July 25, 1983 to November 23, 1983. On November 23, 1983, her involvement with the Schoenfeld case ceased because Steven was placed in

a regular foster home.

She testified that Steven weighed nine pounds, nine ounces when he went to the foster home on July 25, 1983. On August 1, 1983, his weight had increased to twelve pounds. On August 16, 1983, he weighed fourteen pounds, seven ounces.

She testified that the parents visited regularly during the period that she supervised Steven's placement. The visits occurred in the C&YS offices. She supervised many of the visits. She testified that in her opinion the father was more interested in agitating the staff during the visits than in visiting with his child. She testified that the visits were stressful on the child because of the father's behavior.

KAREN COLE

Ms. Cole was employed as a caseworker at C&YS from 1983 through

1986. She served as the family caseworker from November 1983 until August 1984. She testified that as of November 1983, the parents were not participating in any counseling. She asked them to participate in MHMR counseling. They went for one appointment but would not finish the evaluation to determine if they needed counseling. They refused to attend the Parental Stress Center program. During this period that she supervised the case, she believed that the parents made no progress toward the return of their child. They refused or did not get involved in whatever she asked.

ROSE BAGIN

Ms. Bagin was a C&YS caseworker in July 1983. Her only involvement in the case was to take Steven Schoenfeld from his parents' home to Children's Hospital

on July 21, 1983 pursuant to an order of court. She testified that Steven was extremely emaciated. She testified that the photographs admitted as exhibits 6 and 7 accurately depicted his condition.

JEFFREY VAUGHN

Mr. Vaughn has been employed at C&YS since 1984. He has responsibility for the Schoenfeld case from September 1984 until June 1985.

He testified that during this nine month period, the father would not participate in or cooperate with anything that C&YS was trying to work on with him. With respect to family counseling, Mr. Vaughn was asking only that the parents complete an evaluation at Northern Communities. If the evaluation indicated that additional counseling was unnecessary, C&YS would no longer request the parents to participate in counseling.

The parents, however, refused to attend for an evaluation.

C&YS also had questions concerning the ability of the parents to relate to Steven. Consequently, he was requesting the parents to complete an evaluation with the Parental Stress Center. The evaluation would either indicate that no further participation in the program was necessary or that the parents should further participate to develop parental skills necessary for Steven's care.

He testified that the parents regularly visited. The visits no longer appeared to create serious problems for Steven. Robert also attended the visits. He observed substantial parent/child conflict between the father and Robert.

He testified that during the visits the father did not appear genuinely interested in what was going on with his

children. The father spent most of the time discussing a series of complaints or criticisms regarding the care of this children with Mr. Vaughn.

Mr. Vaughn testified that it made no sense for the father to spend his time in this fashion because this was the time that was set aside for the parents to visit with their children. Furthermore, the father was rehashing matters that had been discussed in telephone calls with this caseworker. He testified that the father made calls on almost a daily basis -- he called practically every morning. Therefore, it was entirely inappropriate for the father to take time from the visits to cover the same matters.

DR. SUSAN TIEGS

C&YS introduced the testimony of the September 15, 1983 dependency hearing (petitioner's Exhibit 10) containing the

testimony of Dr. Susan Tiegs. She was the emergency room physician at Children's Hospital who examined Steven on July 21, 1983. She testified that the child was extremely malnourished. She found no physical problems that could explain the malnourished condition. She further testified that at his birth the child was in the 95th percentile for weight, that at his June 21, 1983 admission to Suburban General Hospital Steven's weight was in the 60th percentile, and that on admission to Children's Hospital on July 21, 1983 the child was in the 15th percentile for weight. The child was taking formula in large quantity after he had been in the hospital for a day. She testified that there was no explanation for the malnourished condition other than neglect. In her opinion, the child was

extremely hungry when he came into the hospital and that the malnutrition "was either deliberate or unintentional neglect" (p.12).

She also testified that she observed a bruise on the child's outer ear that was approximately two to three hours old, that there were bruises on both cheeks that were three to four days old, and that there were bruises on the lower leg that were about four days old.

She also testified that she had reviewed the x-rays of the June 1983 leg fracture. The fracture was an oblique fracture. She concluded that this fracture would not have been caused by a child rolling out of a seat and hitting his knee on the pavement or some other object. She also testified that a one month old child does not start rolling and the hospital records did not note any

abrasions consistent with a fall or the striking of an object. She further testified that the bruises on Steven's cheeks could not have been self-inflicted because of the child's age.

BARBARA MITCHELL

Ms. Mitchell has been a C&YS caseworker since December 1984. She was Steven's caseworker from July 1985 through March 1986. At the time that she received the case, the C&YS goal had been changed to adoption. However, C&YS had agreed not to refer the case to the Adoption Department until the parents had one more opportunity to attend the Parental Stress Center program. The parents had been told about the agency's adoption recommendation but had been advised that C&YS would at any time revise the goal to a return to the parents if C&YS staff believed that the

parents could meet Steven's needs. In July, 1985, the parents agreed to attend the Parental Stress Center Begin Again Program. They attended sessions at the center from August 1, 1985 to October 11, 1985. At that time, they were terminated. Parental Stress Center did not recommend that the child be returned. It recommended that the parents be involved in intensive long-term psychological counseling.

She testified that she made arrangements for the parents to attend MHMR counseling at Northern Communities. They were willing to do so.

LINDA BURGASON

Ms. Burgason was employed by C&YS from March 1986 to January 1988. She handled the Schoenfeld case during this entire period. The C&YS goal was adoption but C&YS also established plans

for parents for the return of the child. She testified that if the parents had become more involved, C&YS would have changed its goal for Steven from adoption to return to the family.

She testified that nothing occurred between March 1986 and January 1988 that would precipitate a change of goals. There was little cooperation by the family. Visits were a problem because of the negative effects that they were having on Steven. He would cry and be very apprehensive about going to the visits. It was difficult to separate him from his foster mother. After the visits, the foster mother reported bed-wetting and nightmares.

The father was very demeaning to Robert during the visits. This behavior had a negative impact on the father's relationship with Steven. There was an

incident in which there was a loud verbal exchange between Robert and his father that frightened Steven. Eventually, she scheduled a hearing to obtain a court order excluding the father from visits.

She also testified that the father constantly argued with her. During the visits, he would talk about issues relating to the children's care rather than visiting with the children. She also testified that the father was inappropriate at these visits because he would talk to Steven about the foster parents not being his family and would tell Steven that he would be coming home. This was all very confusing and frightening to Steven. She sought to stop the visits because of Steven's reaction to the visits.

IMOGENE SHELLY

Ms. Shelly has been employed at C&YS

since August 1978. She received the Schoenfeld case in April 1988. The goal was adoption and the petition to terminate parental rights had been filed in the Orphans' Court by the time she became involved.

She testified that in response to the father's request to resume visitation, the Court permitted the father to have three visits to determine their impact upon the child. Visits occurred in December, 1988, January, 1989 and February 1989. She observed problems with the father's behavior during these visits.

BARBARA SCHULTZ

Ms. Schultz was the executive director of the Parental Street Center from 1977 to 1990. She was the supervisor of the Schoenfeld case for the center.

She testified that the center accepts referrals from C&YS for parents of children who have been removed from their homes in dependency proceedings. The center's purpose is to determine if its staff can engage in rehabilitative activities with the parents and the child in order to reunify the family. Activities of the center include group meetings involving several parents to discuss issues related to child development and the care of a child, and issues related to their own situations. The program also includes weekly visits between the parents and child at the center at which staff works with the parents and the child throughout the visit.

She testified that C&YS first referred the Schoenfelds to the center in August 1983. The Schoenfelds canceled

each appointment that was scheduled. After telephone discussions in which the program was described to the Schoenfelds, she assumed that the Schoenfelds were not interested in the services that the center was offering at that time.

She was asked if the center required the parents to admit that they had abused their children as a condition for participation. She testified that there were no conditions that have to be met in order to become a part of the program. "The basic condition was, Show up and let's talk and let's see where we can go".

C&YS again referred the Schoenfelds to Parental Stress Center in September 1984. The Schoenfelds again elected not to accept an appointment.

The third referral occurred in July 1985. The Schoenfelds began

participating in the program on August 1, 1985. They attended seven out of nine parental group meetings. They attended each of the six sessions that involved working interactional visits between the parents and the child. At the beginning of October 1985, the Parental Stress center discontinued its work with the family.

She testified that the Parental Stress Center elected to terminate its services because there were no changes on the part of the parents and the visits were difficult for Steven. With respect to the visits, she testified that the child did not know the parents, and that while both parents wanted Steven to feel comfortable, the visits were not successful or satisfying for anyone. The parents did not have an understanding of the feelings and abilities of a two and

half year old child. They expected the child to act and be treated as an adult. There was constant criticism that Steven was not listening nor doing things right. Their expectations of the child were beyond his years. Their responses to the child prevented them from achieving a positive relationship. There was no progress during the visits because the parents were unwilling to consider the techniques that the center's staff recommended in working with Steven that would have removed some of the barriers and tension.

The center concluded that it could not assist the parents because it was their position that they had no problems, that they had done nothing wrong, that everything that was wrong had to do with other people and that Steven should be returned to them. They were unwilling to

assume any responsibility for their actions. While the center does not require parents to admit that they injured a child, the center's program requires the parents to talk about problems they have as parents and a willingness to consider issues involving child care. It was her conclusion that the father was not capable of making any accommodations to others or of making any changes in his approach to Steven.

The center's recommendation was that the parents engage in long-term intensive psychological counseling and that the child to be returned.

ANTHONY MANNARINO

Dr. Mannarino is a clinical psychologist who testified at two review hearings involving Steven in the Juvenile Court dependency proceedings. It was agreed that the relevant portions of his

testimony offered at the December 21, 1988 and March 15, 1989 Juvenile Court proceedings would be offered through the transcripts of these proceedings.

The visits between Steven and his father had been previously suspended because of testimony presented in the Juvenile Court proceedings that the visits were harmful to Steven. The father requested the resumption of visits. C&YS requested Dr. Mannarino to evaluate whether visits could resume without causing serious harm to Steven. As part of his evaluation, he interviewed Steven, Schoenfeld, and the foster parents, and also saw Steven with the foster parents and Steven and his natural father.

Dr. Mannarino testified that the father acted appropriately with Steven. However, Steven was extremely nervous

when his father was present and he was very upset and anxious once the father left. According to Dr. Mannarino, contacts with his father and mother are a threat to Steven's status in the foster home. He recommended that Steven remain where he is and be adopted because of his attachment to his foster parents and the absence of any attachment to his father.

At the conclusion of the December 21, 1988 hearing, I permitted three visits between the father and Steven in order to determine whether Steven's response to the visits would change after additional contact with his father. At the completion of the three visits, Dr. Mannarino met with Steven (February 22, 1989 meeting). According to Dr. Mannarino, Steven said that he did not like the visits with his father and mother. He did not give specifics but

just said that he was upset by the visits.

Dr. Mannarino concluded that visitation with the father should not continue because of the significant anxiety that Steven experienced. He relied on reports from the foster mother that after the visits the child would wake up three to four times a night. There was bed-wetting and increased stuttering (the foster mother presented similar descriptions in her testimony in the Juvenile Court proceedings). Dr. Mannarino said that he did not expect Steven to adjust to additional visits because the visits simply made him anxious over the possibility that he might not be able to remain in the foster home. Continued visits would not lead to reconciliation because in Steven's eyes reconciliation was removing him from his

parents. There was no way to make Steven comfortable with the visits as long as Steven believed that he might be removed from his foster family. At this time, his stress was not the result of the manner in which the Schoenfelds acted during the visits -- the stress arose because Steven understood that the Schoenfelds were persons who might cause him to be removed from the family that he regarded as the only family.

B.

The parents presented the following witnesses:

WILLIAM BLOSE

Mr. Blose is the elementary principal at the school which Steven attends. He testified that the school records indicate that Steven has good grades and is a normal child adapting well. He has slight difficulties with

speech but nothing of any serious consequence. He talked with Mr. Schoenfeld on one occasion and Mr. Schoenfeld cooperated fully. He has also had contact with the foster parents. They are appropriately concerned about Steven's education. They to have a very good rapport with Steven. The child and the foster parents appear to work well together. There have been no problems at the school that have required the foster parents to be called.

JOSEPH BANSAVAGE

Dr. Bansavage is a clinical psychologist. After Dr. Mannarino had testified in the Juvenile Court proceedings that there should be no further visits between Steven and his father because of the stress that Steven experienced and the unlikelihood that additional visits would improve the

relationship between Steven and his parents, the parents presented the testimony of Dr. Bansavage in support of their request for an evaluation by a psychologist of their own choosing. At the time of his testimony in Juvenile Court (May 10, 1989), Dr. Bansavage had never interviewed Steven. He testified that until he did so, he could not express an opinion as to whether or not visits should be continued because of their impact on the child.

He had reviewed Dr. Mannarino's report. He testified that Dr. Mannarino's evaluation was not adequate because of the apparent absence of any psychological testing. He testified that in these proceedings we are trying to understand Steven and without the results of basic psychological tests, the psychologist is not in a position to make

an informed judgment.

I granted the parents' request for an evaluation by Dr. Bansavage. I instructed C&YS to advise Dr. Mannarino that he should fully discuss any testing that he had completed together with his evaluations with Dr. Bansavage, that any testing that Dr. Bansavage sought should be completed, that Dr. Bansavage would have access to Steven, that he could request interactionals if he believed that it would be helpful, and that C&YS would pay a reasonable fee for his time.

When he testified at the termination proceedings, Dr. Bansavage had met with and tested Steven. He testified that Steven's I.Q. was in the normal range although Steven may have some problem areas suggesting the possibility of some organic brain damage. The testing indicated that Steven had an

exceptionally good personality structure. he was well-integrated. He testified that we are dealing with a nice well-functioning youngster. He had also tested the parents. The test results fell within the category of normal behavior. He found nothing that would indicate that they would be inappropriate parents.

He testified that Steven is very comfortable living with his foster family. Steven sees the foster parents as his parents. He testified that with proper counseling it could be possible for Steven to make the adjustment to a return to his parents. However, this would require a gradual transition after Steven was emotionally prepared for the change.

He testified that Steven should not be forced to leave his foster family

against his desires. For a successful return Steven would need to want to make this change. He testified that with proper counseling and the desire by Steven to return, there could be a successful reunification of the family.

He would not force Steven to return to his natural parents but he also would not totally cut off the possibility of such a return in the future. He believes that as Steven grows older, it is more likely that he will wish to resume a relationship with his natural family. Steven should have this opportunity. In his opinion, parental rights should never be terminated unless the parents are terribly bad or unfit because the research indicates that as children mature they have a need to develop a relationship with their natural parents.

Finally, this witness testified that

the manner in which C&YS permitted contacts between the parents and Steven and the restrictions that it imposed on the visits made the establishment of a relationship between Steven and his natural parents very difficult.

ROBERT SCHOENFELD

Mr. Schoenfeld described his current family consisting of his wife and his four children who are ages fourteen, nine, approximately two years, and less than one year. The older two children attend school regularly. He is involved with them in their school work. The nine year old child is an A student who is enrolled in a program for gifted children.

When he was asked about the leg fracture, he described an incident on the day before Steven was hospitalized in which Steven rolled off the front seat of

a car and hit his leg. He testified that he and his wife examined the leg after the incident and did not find any problems. He denied abusing the child.

When asked if he had any other explanation for the fracture he said that it is possible that his older son Robert had injured the child.

With response to the malnutrition, he testified that following his return from the hospital Steven was eating constantly and had a veracious appetite. However, this was during the summer in a third floor apartment without air conditioning. Steven was in a body cast. What he was taking in he was sweating out just as quickly.

Mr. Schoenfeld testified as to problems that he consistently had with C&YS. Visits took place in a tiny room. He was not permitted to take the children

outside the room. Caseworkers would interfere when he was playing with his children. He was upset because the foster home would not pass on his cards and letters. He disagreed with C&YS' requirement that cards and letters be sent through C&YS and refused to do so. His visits frequently were not for the allotted time because the children were not brought on time. Also C&YS interfered with his efforts to obtain counseling from agencies of his choice. Many of the caseworkers had made up their minds that they were not going to return Steven when they were supposed to be working on a return plan with Mr. Schoenfeld and his wife. In summary, they did more to hinder reunification than to assist the family in achieving his goal. They acted as if they were opposed to any reunification.

He also disagreed with C&YS's decision to terminate the visitation. It was his understanding that visitation was continued because C&YS wanted him to quit talking to Steven about what they were going to do when he came home and they were a complete family. He believed that he was arbitrarily singled out by C&YS because he challenged policies that made no sense.

He denied that Steven had any marks on his face when he was admitted to the hospital on the second occasion.

MARY KENNEDY

Ms. Kennedy is a public health nurse employed by the Allegheny County Health Department. She made one visit to the Schoenfeld house on July 15, 1983 (another public health nurse visited the home on the day prior to Steven's removal. She did not testify). She

observed the mother at the time of the visit. The mother was acting appropriately. Her notes indicate that the baby was very thin but alert. At that time, she felt that the baby was receiving proper care.

JANICE SCHOENFELD

She testified that she has been married to Mr. Schoenfeld for nine years. She is very satisfied with the care that he provides to the children in the household. She has never witnessed any abuse on his part. She testified that she saw Steven shortly after the fall. She twisted and pushed his leg to see if there were any problems. There was nothing wrong with the leg until the next day when it swelled up. At this time, her husband and she took Steven to the hospital. She also believes that Mr. Schoenfeld's son Robert could have caused

the fracture.

When asked about the child's admission to the hospital for malnutrition, she testified that the child did not look any different from when the visiting nurse saw the child on July 15, 1983. The child was a little thin but was otherwise healthy in her opinion. She also said that there were no marks on Steven's face when he was removed.

She expressed concern over efforts that she believed that C&YS was making to separate her husband and herself. She and her husband and four children function well as a family. C&YS did not do what was required to recognize and assist her family in having Steven returned.

III. REVIEW OF THE TESTIMONY AND LAW

C&YS's petition for involuntary

termination of parental rights is based on Section 2511 (a)(5) of the Adoption Act (23 Pa.C.S. Section 2511 (a)(5) which reads as follows:

"The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child."

Steven has been removed from the care of his parents by the court for a period in excess of six months.

On the basis of clear and convincing evidence, I find that the termination of parental rights of Steven's father and mother will best serve the needs and welfare of Steven. Steven has resided in his foster home for more than seven

years. He regards the foster family as his family. He has adjusted well to the home - he is described as a very nice and well-functioning youngster. The possibility that he might be removed from this home creates significant pain and stress. The foster parents wish to adopt. Steven has almost no relationship with his natural parents so termination will not disrupt an existing parent-child relationship. Adoption by the foster parents, on the other hand, will give legal recognition to family which in every important sense already exists.

On the basis of clear and convincing evidence, I find that the conditions which led to the removal and placement of Steven continue to exist and that the conditions have not been remedied within a reasonable period of time with the

services and assistance reasonably available to the parents.

The two incidents that led to Steven's removal established that his home environment seriously jeopardized Steven's health and safety. In September 1983, Steven was found to be a dependent child requiring placement outside the home because of inadequate explanations for bruises on his face and a leg fracture and because of a dramatic weight loss and malnourishment for which there was no reasonable explanation other than neglect.

C&YS's reunification requirements were reasonable. The incidents that led to Steven's removal strongly suggested that Steven's birth had disrupted the functioning of this family. Consequently, it was reasonable for C&YS to require the parents to complete a MHMR assessment and

to complete any counseling which the assessment recommended as a condition for Steven's return. To date, the family has not been willing to permit such as assessment.

It was also reasonable for C&YS to require the parents to participate in a program that addressed parenting skills and child developmental issues and that evaluated the parents' abilities to relate to and to care for Steven. It was approximately two years before the parents were willing to participate in such a program. At that time, the staff of this program concluded that they were not capable of responding to Steven's needs.

With the passage of time during which Steven remained outside the home, the need for successful parental participation in a program designed to

assist the parents in responding to Steven's needs increased. Because Steven is being raised in a foster home, he has come to view the foster parents as his parents and his natural parents have become insignificant. Consequently, it is difficult for his parents to re-establish a relationship with Steven without the assistance of professionals who are capable of assisting the parents in understanding the child's views and needs and the manner in which they must respond. This is an area in which the parents have made no progress because of their inability to work with professionals and to understand Steven's situation.

This case is unusual in that there are presently four other children in the Schoenfeld home. The children appear to be doing well in a family that appears to

be providing appropriate care. This suggests that it may have been possible for the parents to have met the reunification requirements if there has been more cooperation between the parents and C&YS. However, a constant antagonistic relationship between the father and C&YS resulted in the issues leading to Steven's removal being no more resolved today that they were at the time of the removal.

From the outset, the father's response to C&YS was one of complete mistrust, an unwillingness to believe that there was any justification for Steven's removal, and an insistence that matters be done his way because C&YS's methods were based on its any programs that would assist them in understanding the needs of a seven year old child who has lived his entire life with another

family. They have not shown any ability to follow the suggestions of any professionals with respect to their responses to Steven.

It is clear that Steven's return to his natural family would be contrary to Steven's best interests. Even the expert witness whom the parents presented testified that Steven should not be returned unless Steven favors the return. The options proposed to this court by the two professionals are either to give Steven a permanent home with his foster parents or to leave Steven in the foster home as a foster child because of the possibility that as he grows older he may wish to establish a relationship with his natural parents (at the termination proceedings, the mother and father had separate counsel. Through his questioning, counsel for the mother

sought to show that Steven's responses to the mother differed from his responses to the father and that C&YS's primary difficulties during this seven year period have been with the father. Even if this is true, Mr. & Mrs. Schoenfeld and their four children are a family. In these termination proceedings, a major issue is whether Steven can be returned to this family. For the reasons set forth in this Memorandum Opinion, I have concluded that a return would be extremely detrimental to Steven's interests). For the reasons previously discussed, the first option will best serve Steven's needs and welfare.

For these reason. I enter the following order of court.

IN RE:ADOPTION STEVEN S., a minor	**IN THE COURT OF COMMON PLEAS OF A L L E G H E N Y CTY., PA.**
APPEAL OF R.S.	**NO.260of1986**

ORDER OF COURT

On this 3 day of May, 1991, following a hearing on the petition for involuntary termination of parental rights, it is hereby ORDERED, ADJUDGED AND DECREED that all parental rights of Janice M. Peretic Schoenfeld and Robert Lewis Schoenfeld to the minor child, Steven James Schoenfeld, are terminated, that the termination shall extinguish the power or right of Janice M. Peretic Schoenfeld and Robert Lewis Schoenfeld to object to or receive notice of adoption proceedings, and that the custody of Steven James Schoenfeld is awarded to the Allegheny County Institution District.

BY THE COURT:

WETTICK, J.